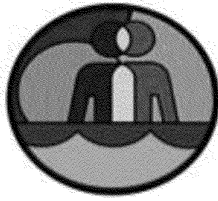


**Local
Government
Advisory
Committee**



November 5, 2014

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Frances Eargle, DFO

Dear Administrator McCarthy:

Thank you for your continuing emphasis on partnership as the EPA and US Army Corps of Engineers evaluate the public comments on the proposed rule regarding Waters of the United States. We are especially appreciative that you have engaged the Local Government Advisory Committee's (LGAC) Protecting America's Waters Workgroup to facilitate outreach to local, state and tribal agencies in the spirit of collaborative partnership. We are hopeful that these face-to-face community conversations will make an impactful contribution towards creating a rule that is embraced throughout the country.

The Workgroup has completed a series of public outreach meetings regarding the proposed rule. The regional meetings, held in St. Paul, Minnesota; Atlanta, Georgia; Tacoma, Washington and Worcester, Massachusetts, provided a strong sense of local perspectives and perceptions regarding the proposed rule.

In summary, there was strong agreement that clean water is an essential foundation for public health, recreation and commerce. However, the Workgroup heard strong sentiments in these areas:

Permitting: While the outreach effort focused on the proposed rule, the preponderance of discussion focused on the permitting process. It became clear that many local agencies are frustrated with the uncertainties and challenges of trying to permit good projects in their communities. Introducing the proposed rule brought all of these concerns to the forefront. A clear and predictable permitting process is an essential foundation upon which any new regulatory proposal would be built.

Clarity: There is also a strong sentiment that the proposed rule does not, as written, provide clear definitions nor achieve the objective of clarifying the extent of federal jurisdiction over local water bodies. Lack of clarity is especially problematic because, in many cases, permitting occurs at the local level and is under the jurisdiction of the U.S. Army Corps of Engineers (USACE). Interpretation of jurisdictional authority by the USACE can be a locally frustrating experience and many local agencies are fearful that the

proposed rule will add to the confusion and/or increase the jurisdictional assertion by the USACE.

Exemptions: The question as to what is and what is not a Water of the United States was a common theme among speakers. Questions arose regarding agricultural exemptions as well as the status of MS4 permittees. These are critical questions that must be easily answered in order for the rule and the permitting process to be effective.

The LGAC report provides several recommendations to the Administrator that can be summarized as follows:

- The permitting process deficiencies must be addressed. Any proposed rule, regardless of its merits, will likely be poorly received until the permitting process becomes more streamlined, effective and predictable.
- The rule must be written so that local agencies, states, EPA and the USACE all clearly understand key definitions and the scope of federal jurisdiction so that implementation is predictable. Whether a water body is or is not under federal jurisdiction must be clear to all parties.
- Agricultural exemptions must be explicitly and clearly stated
- Cost remains a concern, especially in the context of uncertain jurisdictional assertion and an unpredictable permitting process.
- There are significant regional differences which must be considered and addressed in the rule. Regional differences and/or unique circumstances strongly justify the need for flexibility in permitting/implementation.
- There are many local, state and federal (specifically MS4) programs and regulations that protect the nation's water quality. The rule should acknowledge and incentivize best management practices already underway.

The development of a rule that is both clear from a nationwide perspective and adaptable to local conditions is challenging. The rule clarifying the Waters of the United States has such significance, the LGAC would encourage additional collaboration to address the issues raised throughout the public outreach process. There is no doubt that the proposed rule, as written, should be modified to reflect the comments received through the public outreach process as enumerated in our attached report.

Consequently, the LGAC recommends that the EPA continue to engage state, local and tribal agencies in the rule development process. The LGAC has been encouraged by the extensive

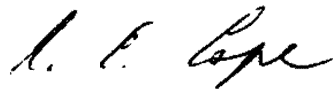
level of local participation and the strong concurrence that clean water is a national asset that must be respected and preserved.

Thank you for engaging the LGAC and the Water Workgroup in your outreach efforts. We will continue our work as needed throughout the rule development process.

Sincerely,



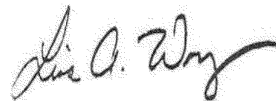
Mayor Robert Dixon
Chair



Commissioner Robert Cope
Chair, Small Community
Advisory Subcommittee (SCAS)



Susan Hann
Chairwoman, Protecting America's
Waters Workgroup



Mayor Lisa Wong
Chairwoman, Environmental
Justice Workgroup

November 5, 2014

**INITIAL FINDINGS AND RECOMMENDATIONS PERTAINING
TO EPA'S CLEAN WATER ACT
WATERS OF THE U.S. PROPOSED RULE**

LOCAL
GOVERNMENT
ADVISORY
COMMITTEE

Protecting
America's Waters
Workgroup



From the LGAC's Charter, defining general goals:

The LGAC is a policy-oriented committee. To assist the agency in ensuring that its regulations, policies, guidance, and technical assistance improve the capacity of local governments to carry-out these programs, the LGAC provides policy advice and recommendations to the EPA Administrator.

Message from the LGAC Chair:

I am honored to be the Chair of this LGAC composed of 28 local elected and appointed officials. LGAC Members share a love for the environment and our communities. The proposed Waters of the U.S. rule is an important tool for federal, state, tribal and local officials to use in our collaborative role in environmental stewardship. But, the rule and its implementation must be clear, predictable and equitable.

Thank you to EPA Administrator McCarthy for partnering with the LGAC to reach out to local communities regarding the proposed rule. The outreach process provided an insightful, community-based view of the rule and how it will be received at the local level. The LGAC is hopeful that the findings and recommendations resulting from this process can guide the EPA moving forward.

Thank you to the many local officials who contributed to the process and special thanks to Administrator McCarthy and the EPA staff for their inclusive and collaborative approach. By working together, I am confident we can achieve a legacy of clean and safe water throughout our nation.



**Mayor Bob Dixon, Greensburg, Kansas, and
Chair of the LGAC**



**Susan Hann, City Manager, Palm Bay,
Florida and Chairwoman of the LGAC
Protecting America's Waters Workgroup**

***Message from the Workgroup
Chairwoman:***

The EPA's engagement of the LGAC's Protecting America's Waters Workgroup broadened the community conversations regarding the proposed rule and is indicative of the Administrator's "new era of partnership" with local government. The Workgroup found that communities across the country were very receptive to and appreciative of the opportunity to engage in collaborative dialogue to evolve the rule in a way that advances clean water objectives within a facilitative framework.

TABLE OF CONTENTS

Executive Summary

- I. Introduction and Background
 - A. The LGAC and Protecting America's Waters Workgroup
 - B. The New Era of Partnership
 - C. Historical Context and EPA's Proposed Waters of the U.S. Rule
 - D. Committee Charge
 - E. Public Meetings
- II. Water and our Communities
 - A. Ecological Services
 - B. Water and Environmental Justice Communities
 - C. Water and Agriculture
- III. Response to Charge: Findings and Recommendations
 - A. Charge: Priorities
 - B. Charge: Clarity
 - 1. Definitions
 - C. Charge: Issues
 - 1. Environmental Justice
 - 2. Jurisdictional Issues and Exemptions
 - 3. Agriculture
 - 4. Interpretative Rule
 - D. Charge: Additional Interactions
 - 1. Implementation
 - 2. State Assumption
 - 3. Local Solutions
 - 4. Cost to Local Government
 - 5. Enforcement
 - 6. Outreach to States, Tribes, and Local Government
- IV. Next Steps and Conclusion
 - A. Next Steps
 - B. Conclusion
- V. Acknowledgements

Appendices

Appendix I: Local Government Advisory Committee Members and Protecting America's Waters Workgroup Members

Appendix II: List of Participants

Appendix III. Workgroup Meeting Records

LGAC Waters Workgroup Meeting in St. Paul, May 28, 2014

Discussion on the Proposed Rule

Public Comments

LGAC Waters Workgroup Meeting in Atlanta, July 10, 2014

Discussion on the Proposed Rule

Public Comments

LGAC Waters Workgroup Meeting in Tacoma, August 13, 2014

Discussion on the Proposed Rule

Public Comments

LGAC Waters Workgroup Meeting in Worcester, September 22, 2014

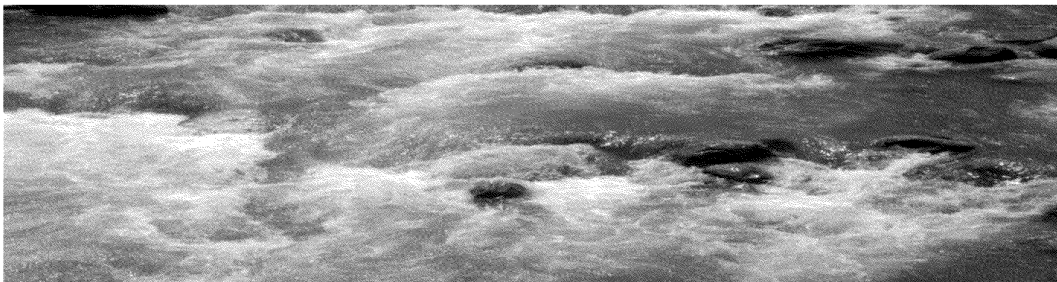
Discussion on the Proposed Rule

Public Comments

Appendix IV. EPA's Waters of the U.S. Proposed Rule

Appendix V: Clean Water Act Exclusions and Exemptions Continue for Agriculture

Appendix VI: Proposed Waters of the U.S. Rule Presentation



Executive Summary

The LGAC has been charged with providing advice and recommendations on the proposed Waters of the U.S. rule. In order to gain input from other local governments, the Workgroup convened public outreach meetings in St. Paul, Minnesota; Atlanta, Georgia; Tacoma, Washington and Worcester, Massachusetts. These regional meetings provided an excellent cross section of perspectives from across the country.

In summary, all agreed that clean water is essential for public health, recreation and commerce. However, the Workgroup also heard a strong theme that the proposed rule, as written, does not achieve the clarity intended, which causes great concern over implementation at the local level.

Yet, despite the implementation concerns, many are willing to collaborate to develop a rule that works at the local level. State, tribal and local governments are where clean water policy meets action. This report reflects the innovation and creative thinking that resulted from the Workgroup outreach process. Additional collaboration with local agencies and subject matter experts can further evolve the rule to achieve optimum results.

The Workgroup, in cooperation with the Small Communities Advisory Subcommittee, the Environmental Justice Workgroup and the entire membership of the LGAC, has prepared detailed recommendations regarding clarity of definitions and agricultural parameters. Regional differences will require flexibility and creativity in the permitting framework. Also noted is that Municipal Separate Storm Sewer System (MS4) permittees are a potential source of best management practices, especially in the realm of green infrastructure, which can be incentivized through the proposed rule.

This public outreach process has revealed that the proposed rule is a starting point. Considerable work remains if the rule is to be embraced locally. Fortunately, there is strong interest at the local level to work with EPA and the US Army Corps of Engineers to craft a rule that will be effective and facilitative.

I. Introduction and Background

A. The LGAC and Protecting America's Waters Workgroup

The LGAC is a chartered federal advisory committee charged with crafting recommendations to EPA on various issues. The LGAC has twenty-eight (28) elected and appointed members representing local, state and tribal governments.

The LGAC *Protecting America's Waters Workgroup* was established in December 2010 to address the LGAC's need to provide input on the nation's water infrastructure and water quality with the local community perspective. It consists of 13 local government officials.

Protecting America's waters through improving and maintaining water quality, protecting drinking water and addressing water infrastructure needs are priorities for EPA. In regards to water, EPA's overall charge to the LGAC is to provide recommendations on the following priorities:

1. Water infrastructure needs
2. Local strategies (including green infrastructure) for addressing nonpoint source pollution, including stormwater runoff
3. Protecting great water bodies and neglected urban rivers

From the Administrator's speech in St. Paul, Minnesota:

"The workgroup will identify issues the agencies could use in a rule defining "Waters of the U.S." that would help protect local communities' interests in clean drinking water; decreased frequency and severity of flooding and drought; maintaining safe water-based recreation; ensuring adequate useable water for growing food, generating energy, and for manufacturing; and ensuring healthy waterfront development."

In the past, The Protecting America's Waters Workgroup has provided recommendations on:

1. Integrated municipal stormwater and wastewater planning framework
2. Stormwater management practices
3. Managing the environmental impacts of hydraulic fracturing

Consequently, the Workgroup is the logical choice to engage local communities in conversations regarding water resource issues.

B. The New Era of Partnership

EPA has launched a new model of collaborating with local government partners to achieve a cleaner, healthier environment. Rules enacted at the federal level are often implemented at the local level. Consequently, a foundation of trust and partnership allows a culture of shared responsibility and accountability to develop. The Administrator's emphasis on partnership is producing results in that local agencies are stepping up to bring their ideas to the table resulting in a widening pool of best practices.



LGAC Member Kevin Shafer with EPA Administrator Gina McCarthy

Engaging the LGAC and the Water Workgroup to do outreach with local agencies regarding the proposed rule clarifying the definition of Waters of the United States is another example of the Administrator's commitment to partnership.

C. Historical Context and EPA's Proposed Waters of the U.S. Rule

Congress enacted the Clean Water Act (CWA) in 1972 [33 U.S.C. §§1251 to 1387] to prevent the pollution of waters of the United States, including waters not deemed traditionally "navigable" such as streams, lakes, and wetlands. Since then, the CWA has been instrumental in protecting public health and the environment. However, Supreme Court decisions in 2001 and 2006 interpreted the Clean Water Act in ways that changed the approach for determining whether a water body was protected under the Act. The Supreme Court's decisions shifted focus away from potential effects on interstate commerce, and towards connectivity among waters and potential effects of a water on the integrity of downstream navigable waters.

The U.S. Environmental Protection Agency and the U.S. Army Corp of Engineers have proposed a joint rule to clarify the definition of "waters of the United States" in the 1972 Clean Water Act. It was published in the Federal Register on April 21, 2014 [79 Fed. Reg. 22,188] with a public comment period that has been extended twice to close on November 14, 2014.

The intent of the proposed rule is to clarify what waters are covered under the Clean Water Act. Following Supreme Court decisions in 2001 and 2006, determining protection for streams and wetlands became more complex. Requests for a rule to provide clarity came from Congress members, state and local officials, industry, agriculture, environmental groups and the public.

The proposed rule provides specific exclusions for agriculture. It both preserves exemptions that have existed previously, while including new exemptions in coordination

with the US Department of Agriculture under an Interpretive Rule released at the same time as the proposal.

D. Committee Charge

The formal charge outlines the role of the Workgroup relating to the proposed rule which defines 'Waters of the United States'.

The Workgroup will:

1. Develop recommendations for the chartered LGAC to consider in developing advice for the EPA to help identify and analyze priority issues related to the proposed rule
2. Identify areas where the agencies could provide clarity on how it will impact local activities
3. Determine the issues that agencies could use in a rule defining *Waters of the US* that would help protect local community interest in drinking water, decreased flooding and drought, maintaining water-based recreation, ensuring adequate water for agriculture, generating energy, manufacturing and healthy waterfront development
4. Recommend how the EPA can work with local governments more effectively on issues-what additional interactions between EPA and local governments would help disseminate understanding of how the rule would apply? Are there additional policy discussions that could help address local questions about implementation, such as ditch maintenance or green infrastructure?

The Mississippi River is important to the quality of life and economic prosperity of not just this city (St. Paul), but also the nation. This is why this discussion of 'water' is so very important to local governments.

*-Mayor Chris Coleman
St. Paul, MN*

E. Public Meetings



Tacoma, WA was a meeting site for Protecting America's Waters Workgroup on Aug. 13, 2014

In response to this charge, the Workgroup held four face to face public meetings to engage local officials regarding the proposed rule. The goal of these meetings was to hear input and develop recommendations for the chartered LGAC to consider in their advice and recommendations to the EPA Administrator. Local officials have tremendous knowledge and offer unique on the ground perspectives on environmental issues that impact their communities. The meetings were held in diverse geographical regions to engage a wide range of officials. These meetings were held in St. Paul, Minnesota; Atlanta, Georgia; Tacoma, Washington and Worcester, Massachusetts.

This has been a collaborative process, where the Workgroup heard from a very diverse group of local agency representatives and then distilled these perspectives into a set of recommendations for the LGAC to adopt and transmit to the EPA Administrator.

II. Water and our Communities

Throughout the country, there has been a general consensus that protecting the nation's water sources is important to local government. Local governments realize that water quality affects the health and economies of their communities.

"Water has always been in the heart of our city. We want our waters to be clean, safe and cost-effective so our municipalities can thrive."

*-Mayor Marilyn Strickland
Tacoma, WA*

Although the Workgroup has developed specific recommendations in response to the Administrator's Charge, the preamble to the recommendations is a brief discussion of why clean water is important to the nation's ecological resources and to the health of our communities as well as to agriculture.

A. Ecological Services

Small streams, including those that do not flow all of the time, make up the majority of the nation's waters.¹ These water sources, which scientists refer to as headwater streams, are often unnamed and rarely appear on maps. Yet the health of small streams is critical to the health of downstream communities and the entire network of our nation's rivers.

Headwaters, seasonal streams and rain-dependent streams absorb significant amounts of rainwater, runoff and snowmelt. These streams play a critical role in protecting downstream communities by moderating flooding during heavy flow and by maintaining flow during dry weather. Wetlands function as natural sponges that trap and slowly release surface water, rain, snowmelt, groundwater and flood waters. Wetland vegetation slows the flow of flood waters and protects shorelines and stream banks against erosion. Over the last 30 years, freshwater flooding has cost an average of \$7.8 billion in direct damage to property and crops each year, according to a 30-year average calculated by the National Weather Service.² Functioning wetlands, seasonal streams, and rain-dependent streams can buffer communities from some of the worst impacts of severe floods. In fact, preserving and restoring wetlands can often help provide the level of flood control otherwise provided by expensive dredge operations and levees.



Wetland in Louisiana

Streams and wetlands that only flow for part of the year are unique and contain diverse habitats which can support thousands of species, including plants, fish, amphibians, birds and mammals. These water features are important as spawning and nursery habitats,

¹ "Water: Rivers & Streams." EPA.

² "Hydrologic Information Center-Flood Loss Data." NOAA's National Weather Service.

seasonal feeding areas, refuge from predators and competitors, shelter from extreme weather, and travel corridors.

Wetlands are some of the most biologically productive natural ecosystems in the world, comparable to tropical rain forests and coral reefs in their productivity and the diversity of species they support. Abundant vegetation and shallow water provide diverse habitats for fish and wildlife, and supports valuable commercial fish and shellfish industries. Streams and wetlands can reduce the pollution that flows to larger downstream rivers, lakes, bays, and coastal waters. They are able to retain sediments and excess nutrients, such as nitrogen and phosphorus, and prevent these pollutants from traveling further downstream where they could cause algal blooms or dead zones. This characteristic makes streams an important source of drinking water –1 in 3 Americans, about 117 million people, utilize drinking water systems that rely on streams.³

B. Water and Environmental Justice Communities

Even today, some communities, particularly environmental justice (EJ) communities, have unreliable access to clean safe drinking water. These communities may face additional health risks (to an already burdened area) every time they use their local water source for recreation and/or drinking water. Furthermore, in many communities economic livelihood is directly or indirectly connected to the quality of their local water source. The proposed rule is intended to serve as another important tool towards advancing clean water for all communities throughout the country.

"When headwater streams and wetlands are destroyed, drinking water systems get destroyed. I've seen that across the Northeast. I've seen flooding events become more severe across the Northeast. We need to protect these not just for water quality but public health."

-Curt Spalding, Regional Administrator, Region 1

Reliable Clean, Safe Drinking Water

The lack of access to reliable, safe, and clean drinking water disproportionately affects low income EJ communities (who already have significant health disparities) and vulnerable populations across the country. Oftentimes, these communities' waters suffer the downstream impact of agricultural runoff, sewage, industrial waste, mining, and improper disposal of medical waste. The Rio Grande River, is one such water body that is affected by all of these activities. Communities that rely on the Rio Grande River for drinking water include predominately Latino communities in large urban centers, rural areas and unincorporated areas called "colonias" in which 25% of residents lack treated water

and one-third live below the poverty line. Communities like this around the nation are disproportionately affected by drinking water contamination.

Public Health

³ "Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S." EPA.

Contaminated water bodies can significantly harm the health of a community. The cumulative health risk from drinking or fishing from a local water source is much higher in these communities and have particularly adverse effects on pregnant women and children. For example, in 2010, 1.1 million pounds of toxic waste from nearby industries were discarded, directly and via streams, into the James River.⁴ Among this waste were arsenic and benzene—known carcinogens that have also been associated with developmental disorders. Additionally, those that do not have direct contact with water can still experience the health effects of water contamination. The Anacostia River, despite having been a dumping ground for sewage and toxic waste, provides fish for 17,000 people annually.⁵ These anglers, predominately minorities, fish from the river regularly and are likely to share their catch with their families.⁶ Those who consume contaminated fish from such waters around the country are at risk for cancer and liver disease. Pregnant women, children, and unborn children are particularly susceptible to these diseases. Therefore, the health of these waters whether used for drinking, recreation, or fishing can be directly related to the health of these communities. With climate change exacerbating water quality issues, infrastructure resources for water treatment plants and waste water treatment facilities must be addressed, especially for EJ communities.



Trash in the Anacostia River

Communities with Water Dependent Economies:

Finally, communities with economies embedded in fishing, tourism, and manufacturing are more susceptible to harmful changes in water quality. American Indian tribes, like those near the Puget Sound region, exemplify this highly dependent relationship. In 2007, hatchery and harvest operations reeled in about \$18 million to tribal personal income.⁷ In an area where the average annual income is \$10,233, a decline in the availability of healthy fish can significantly impact the economies of these communities.⁸ Good water quality is not only essential for fishing communities but is also important to those areas that rely on tourism and

"It's not just about protection of natural resources- it's about jobs, the shellfish industry, tourism, how we recreate, fishing, spending time with our children, about our Native cultures. Saving the Puget Sound is a big deal."

*-Sheida Sahandy,
Puget Sound Partnership*

⁴ "Virginia Second-Worst State for Toxic Chemicals Dumped into Its Waterways." Environment Virginia.

⁵ "Addressing the Risk: Understanding and Changing Angler's Attitudes About the Dangers of Consuming Anacostia River Fish." Anacostia Watershed Society.

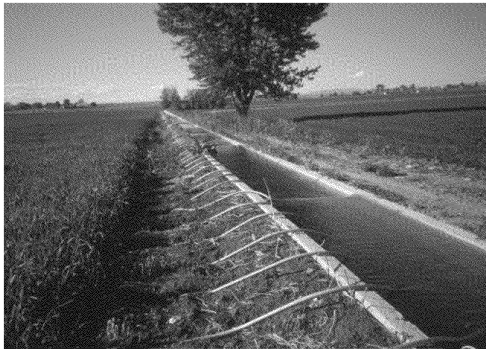
⁶ "Addressing the Risk: Understanding and Changing Angler's Attitudes About the Dangers of Consuming Anacostia River Fish." Anacostia Watershed Society.

⁷ "Draft Environmental Impact Statement on Two Joint and State Tribal Resource Management Plans for Puget Sound Salmon and Steelhead Hatchery Programs." NOAA Fisheries-West Coast Region.

⁸ "Draft Environmental Impact Statement on Two Joint and State Tribal Resource Management Plans for Puget Sound Salmon and Steelhead Hatchery Programs." NOAA Fisheries-West Coast Region.

recreational water usage. Additionally, the economies of communities that are not located near waters can suffer the effects of water pollution. For example, manufacturing jobs are important to many inland communities including Fitchburg, MA. As certain types of manufacturing require high quality water, the livelihoods of such communities are tied to the health of water sources, even if they are miles away. Improving the quality of water is not just a public health issue, but also a step towards a sustainable economy that will safeguard our future generations.

C. Water and Agriculture



Water used for agricultural irrigation

Agriculture plays a critical role in our nation's economy and is the backbone of all of our communities. According to the USDA, agriculture accounts for about 70% of our livelihoods and contributes to national food security.

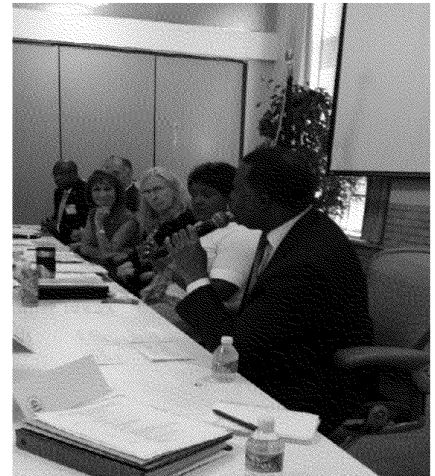
Agriculture also accounts for 80% of the nation's water use.⁹ Aside from groundwater, much of the water used for irrigation in agriculture originates in rivers, wetlands, and other surface waters. Pollution of these sources affects the quality of crops which can be produced and sold. Toxics like PCB and arsenic, found

in some of the waters mentioned previously, are absorbed by plants via the roots and can cause harmful health effects if ingested. Therefore the vitality of agricultural communities and industries is tied to water quality. The intent of the proposed rule is to allow for better protection of these water sources thus safeguarding producers and consumers of agricultural products. However, it must be noted that topography and water sources vary from region to region as do agricultural practices. The rule and the exemptions must allow for regional differences.

⁹ "Irrigation & Water Use." USDA ERS.

III. Response to Charge: Findings and Recommendations

The LGAC acknowledges that the purpose and intent of the EPA in proposing the Waters of the U.S. rule is to help provide predictability and equitability in permitting for activities in waters of the U.S. Water resources are critical to the prosperity of our cities and communities. There is an implied public trust held in managing our water resources at the national level, and this trust is held by public officials at all levels. The LGAC appreciates that the EPA has charged the Committee with providing advice and recommendations on these issues that adjoin our local government concerns for managing our communities' natural resources. Given this charge, the LGAC proposes the following recommendations to address the proposed rule language, which currently lacks the clarity and definitions needed for the rule to be implemented and defensible.



"This is a critical time in which water is needed to strengthen our economy. Rivers are a limited resource that are supporting larger and larger communities. Their protection is paramount. "
-Mayor Kasim Reed, Atlanta, GA (pictured above at LGAC public meeting)

A. Charge: Develop recommendations for the chartered LGAC to consider in developing advice for the EPA to help identify and analyze priority issues related to the proposed rule.

The LGAC has met four times in different locales across the country and has heard from local government, communities, and agriculture groups in these areas. Throughout these meetings, six main priority areas were identified and will be elaborated in depth throughout this report.

- Clarity in definitions
- Explicit exemptions
- Simplifying the permit process
- Improved communication to local government
- Consideration of Environmental Justice communities
- Cost

B. Charge: Identify areas where the agencies could provide clarity on how it will impact local activities.

1. Definitions

Findings:

The purpose of the proposed Waters of the U.S. rule is to provide clarity. The LGAC fully supports and endorses EPA's efforts for clarification of Waters of the United States. These improvements are long overdue. However, the proposed rule maintains some vague language and omits key definitions, leaving open the same basic questions of jurisdiction and potentially resulting in inconsistent implementation. Without these definitions in place, the EPA is not clarifying and is not providing for consistent regulation.

"We did an exhaustive survey of every WOTUS court case since *Rapanos*. What we found was chaos. Courts within a circuit and among circuits would have different interpretations. We can't have law that's interpreted so differently. We like that the rule creates clearer categories. We think that there's room for improvement but that it is a strong step forward for protection, federalism, and clarity of the law".
-Philip Bein, Assistant Attorney General, NY

While the LGAC does not have specific language recommendations for all of the definitions of the proposed rule, the LGAC does offer the following for the EPA to consider including, redefining or clarifying.

Recommendations:

- ◆ The LGAC recommends that EPA should, where appropriate, use definitions that are used consistently across all of the federal agencies, e.g. EPA, Army Corps of Engineers, Federal Emergency Management Agency, Department of Agriculture, U.S. Geological Survey and U.S. Forest Services.
- ◆ The LGAC recommends that an Interagency Workgroup be tasked to develop a glossary of definitions and publish this Interagency Glossary of Terms, following public review.
- ◆ The LGAC recommends that definitions be practical, written in plain English, and be enforceable.
- ◆ The LGAC recommends that narrative descriptions with examples be provided to augment the definitions, as well as pictures, where this could achieve greater clarity.
- ◆ The LGAC recommends that the public have the opportunity to comment on these proposed definitions.

- ◆ The LGAC recommends that the following terms, among others, be defined concisely and with clarity: ‘other waters’, ‘significant nexus’, ‘adjacent’ and ‘upland’. Furthermore the LGAC recommends ‘upland’ be defined based upon exclusion of what it is not.
- ◆ The LGAC recommends that EPA consider the following when defining these terms:

Wetlands

- The LGAC recommends that the current definition of wetlands be used: “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support and that under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.”

Floodplains

- The LGAC recommends using the definition of the Interagency Taskforce on Floodplains-“Floodplains include low-lying areas adjacent to and the water bodies of streams, rivers, lakes, estuaries, and coastal zones that are inundated or may become inundated as a result of changing conditions.” The definition of floodplains should take into account movement of flood lines due to account extreme weather events.

Riparian area

- The LGAC recommends that riparian areas be defined as “an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.”

Floodway

- The LGAC recommends that ‘floodway’ be defined as a flood course within the banks or within a canyon where water would be expected to flow under normal circumstances.

Ditches

- The LGAC recommends a clear definition of ‘ditch’ be provided in the proposed rule.
- The LGAC recommends the following Google Dictionary definition of ‘ditch’: a “narrow channel dug in the ground typically used for drainage”. Examples listed are trench, croft, channel, dike, drain, watercourse conduits.

Tributaries

- The LGAC recommends a clear definition of ‘tributaries’ be included in the proposed rule using clarifying examples.
- The proposed rule refers to a term “rain dependent stream”. The LGAC recommends that this term be defined and an example of a stream that is not rain dependent be provided.

Significant Nexus

- The LGAC regards this to be the most important definition contained within the proposed rule and at the heart of jurisprudence in the issue of Waters of the U.S. It is uncertain how ‘significant’ nexus would be interpreted so the Committee recommends EPA describe significant nexus such that it is in plain English, with specific terms and examples.
- The LGAC recommends that the agency consider all three parameters of water quality in this determination so that “the chemical, physical, and biological integrity of water” be the criteria used for ‘significant nexus’. Likewise, the LGAC does not agree that only one of these features be used as the benchmark, but that all three parameters of chemical, physical and biological integrity of a water body are all equally important.
- The LGAC does not agree with the term “significant effect” and also recommends language of “insignificant or speculative” be deleted.
- The LGAC is aware that the EPA has charged the Science Advisory Board with interpreting significant nexus and connectivity based on the best science available. The LGAC is uncertain how to comment on this without the benefit of these important and critical definitions being in place.

C. Charge: Determine the issues that agencies could use in a rule defining Waters of the US that would help protect local community interest in drinking water, decreased flooding and drought, maintaining water-based recreation, ensuring adequate water for agriculture, generating energy, manufacturing and healthy waterfront development.

1. Environmental Justice

Findings:

The Committee recognizes that disparities in access to clean, safe drinking water are prevalent in our country and disproportionately affect low income, small and rural

communities, minorities and vulnerable populations. Because of this, the LGAC urges the EPA to further their engagement with EJ communities. The proposed rule could improve access to clean and safe water for these communities but in order to do so, communication of the rule is critical. Additionally, the LGAC has concerns about how the agency will incorporate EJ into the final rule; and whether EJ communities will be given consideration in permitting consistent with Executive Order 12898.

Recommendations:

- ◆ The LGAC recommends that EPA expand their communication of the proposed rule and its effects to low income EJ communities, especially those with poor access to clean water. This would involve on-the-ground engagement with community members and creating outreach materials that are community-oriented and multi-lingual.
- ◆ The LGAC recommends that the EPA, before issuing a permit such as those for MS4s, analyze the impact to nearby communities and identify whether a community is disproportionately affected. The Committee recommends that if a community is disproportionately affected, a permit should not be authorized.

2. Jurisdictional Issues and Exemptions

Findings:

The LGAC believes that clear boundaries of WOTUS jurisdiction and clear exemptions are crucial for the support of local governments.

Clear boundaries provide for more equitable and predictable permitting and also for better protection of our water resources.

The LGAC concludes, based upon the testimony that we heard and the analysis of the Committee, that a revised rule can significantly clarify the historic confusion and uncertainty resulting from conflicting case law and Supreme Court decisions.

The LGAC has heard a broad level of concerns from municipal associations and county governments concerning MS4s. The LGAC is uncertain of what the regulatory impact will be on MS4s as the proposed rule is currently written.

MS4s and green infrastructure are foundational to the continuum of care that is being implemented at the local level to improve water quality. Many communities already heavily focus on water quality programs and projects; these communities should be encouraged and incentivized to do more. The proposed rule should recognize that much of the action towards cleaner water happens at the local level. High performing local agencies should be noted as following best practices and afforded a relaxed regulatory environment in those circumstances where water quality objectives are met and exceeded.

The LGAC believes that making jurisdiction calls of what is exempt and what is not in a timely fashion is critical to protecting water resources and providing predictability to state and local governments. The LGAC believes that easily accessible predictive tools need to be developed and utilized to speed this process.

Recommendations:

- ◆ The LGAC recommends that EPA consider a bright-line on ‘*other waters*’ to provide more clarity on what is jurisdictional under the CWA. For example, it would be well-advised that EPA determine with accuracy what areas are considered to be ecologically significant and to list these areas and provide examples.
- ◆ The LGAC recommends that EPA clearly articulate jurisdictional waters in an outreach plan which, in plain English, describes these areas with a clear statement of why they are in need of protection. This will provide local governments with more certainty and assurance in communicating the rule to their communities.
- ◆ The LGAC highly recommends explicitly specifying when ditches would be considered jurisdictional.
- ◆ The LGAC recommends that manmade conveyance components of MS4s be exempt from Waters of the United States. This includes manmade green infrastructure, roads, pipes, manmade gutters, manmade ditches, manmade drains, and manmade ponds.
- ◆ The LGAC recommends that natural conveyance components of MS4s are included in Waters of the United States. This includes natural wetlands and associated modifications to natural wetlands.
- ◆ The LGAC recommends that the rule incentivize green infrastructure projects.
- ◆ The LGAC recommends that there be some criteria which exempt certain activities in Waters of the U.S. for public safety and hazards. This is particularly critical in flood prone areas and for disadvantaged communities in floodways that may need to have emergency relief quickly and rapidly.
- ◆ The LGAC recommends that EPA work to identify regional areas where jurisdictional determinations could be problematic in terms of sea level rise and where groundwater and surface flow intermix. For example, it is unclear how the state of Florida juxtaposed nearly at sea level, will be categorized. In this specific region, conceivably all waters could potentially be jurisdictional. The LGAC recommends that specific guidance be developed to address and classify these areas with region-specific criteria used to assess this determination.

- ◆ The LGAC recommends that EPA, working with the Corps of Engineers, develop a tool for use by local governments which a permittee can use to assess their own jurisdictional status. For example, this could involve a simple categorical, printable questionnaire in a decision tree framework with questions aimed with an outcome of 'yes', 'no' or 'maybe-call your local Corps representative'. The LGAC recommends this method be computerized and developed as a smartphone application which yields a simple predictive outcome.
- ◆ The LGAC recommends that EPA work directly with stormwater associations to provide guidance to best address MS4s, stormwater controls, and their jurisdictional determinations.
- ◆ The LGAC recommends that EPA look to stormwater experts and the practical advice that stormwater professionals can lend to the final rule the EPA is considering in Waters of the U.S.
- ◆ The LGAC recommends addressing how mining impoundments or borrow pits will be addressed within jurisdiction of WOTUS.
- ◆ The LGAC recommends that regional and local technical manuals as well as other communication tools (e.g. checklists, smartphone apps, etc.) that account for geographic differences in each EPA region be developed to assist with jurisdictional calls.
- ◆ The LGAC recommends that EPA provide planning maps at the state level which could be used as a planning tool to ascertain jurisdictional probability with high certainty. Such mapping would include the Hydrologic Unit Codes (HUC) for waterways. *(It is presumed that all waterways with a designation of HUC-12 or less will be included in WOTUS.)*

3. Agriculture

The Small Community Advisory Subcommittee (SCAS) of the LGAC investigated in greater depth the agricultural related issues of the proposed rule. The SCAS had some observations from the testimony received. Also, several of the SCAS Members are also agricultural producers and work for the Conservation Districts. Due to lack of clear definitions and the Science Advisory Board Report on connectivity not yet completed, the SCAS was not entirely able to assess the impacts and full merits of the proposed rule as it is currently written.

Agricultural issues remain an area where there is a great deal of uncertainty and confusion. The SCAS believes that the agricultural community presents the greatest challenge but also offers the greatest receptivity to recognizing the importance of conservation and protection of our natural resources. Agriculture is a water-dependent business and cannot flourish without adequate supplies of clean and safe water.

Recommendations:

- ◆ The LGAC recommends that EPA develop a “rural strategy” which would address the issue of Waters of the U.S. on agricultural lands and rural communities. This rural strategy could provide more comprehensive planning and resources to address the full range of water quality and community issues associated with rural America and disadvantaged small communities.
- ◆ The LGAC recommends that there be consistency between Natural Resources Conservation Services (NRCS) and EPA on interpretation of normal farming practices and that a clear definition of normal farming practices be included. Furthermore, the LGAC recommends a manual of agricultural exemptions be developed and published.
- ◆ The LGAC recommends that the jurisdiction of farm ponds, artificial lakes and ponds created by excavation and/or diking dry land for purposes of stock watering, irrigation, settling basins or rice production be excluded from WOTUS.
- ◆ The LGAC recommends that floodplains be established at a level of 50 year, 100 year and 500 years for agricultural purposes.
- ◆ The LGAC was made aware of the State of Tennessee’s Water Quality program, and the LGAC recommends that the EPA investigate this approach in regard to jurisdictional waters on agricultural lands.
- ◆ The LGAC recommends that EPA facilitate better working relationships with the Corps, especially in regard to agricultural lands.
- ◆ The LGAC recommends that dams and drainages designed for fire prevention be exempt from WOTUS.
- ◆ The LGAC recommends that settling ponds and basins be determined on a regional case by case specific basis.
- ◆ The LGAC recommends increasing the boundaries of riparian areas in the Conservation Reserve program so that they enhance protection of waters.
- ◆ The LGAC recommends that EPA continue to work with NRCS to incentivize farming practices that improve water quality.